90-980

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Petitioner,

v.

EDMUND J. BODINE, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION

TED R. MANRY, III
(Counsel of Record)
CHARLES W. PITTMAN of
MACFARLANE, FERGUSON, ALLISON
& KELLY
Post Office Box 1531
Tampa, Florida 33601
813/223-2411

ATTORNEYS FOR FEDERAL KEMPER LIFE ASSURANCE COMPANY, PETITIONER

QUESTION PRESENTED

SHOULD THIS COURT INVOKE ITS SUPERVISORY JURISDICTION WHERE THE OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IN THIS DIVERSITY ACTION VIOLATES *ERIE RAILROAD CO. V. THOMPKINS,* 304 U.S. 64, 82 L.Ed 1188, 58 S.Ct. 817 (1938) AND ITS PROGENY, BY: (1) REFUSING TO APPLY UNAMBIGUOUS RULES OF DECISION OF THE SUPREME COURT OF FLORIDA WITH RESPECT TO THE "IMPACT DOCTRINE" AS A BAR TO RECOVERY OF DAMAGES FOR PURELY PSYCHIC INJURY BY A PLAINTIFF PLACED IN FEAR OF HIS OWN LIFE; AND (2) WHOLLY IGNORES THE SUPREME COURT OF FLORIDA'S EQUALLY UNAMBIGUOUS MANDATE THAT PSYCHIC INJURY WHICH PRODUCES "OBJECTIVELY DISCERNIBLE PHYSICAL IMPAIRMENT" IS AN INDISPENSABLE ELEMENT OF ANY CAUSE OF ACTION FOR PSYCHIC INJURIES BASED UPON SIMPLE NEGLIGENCE?

PARENTS AND AFFILIATES OF KEMPER

Petitioner, Federal Kemper Life Assurance Company is part of and affiliated with Kemper Group Financial Companies which includes the following companies for purposes of Supreme Court of the United States Rule 29.1:

Lumbermans Mutual Casualty Company
Kemper Corporation
Kemper Financial Companies, Incorporated
Financial Services, Inc.
Stewart-Jennings, Incorporated
Investors Brokerage Services, Inc.
Investors Fiduciary Trust Company
Kemper Investment Management Company
(Limited England)
Kemper-Murray Johnstone International, Incorporated
Kemper Sales Company
Kemper Asset Management Company
Kemper/Cymrot, Incorporated
Kemper/Cymrot Management, Incorporated
SFA Holding Company, Ltd.
Mortgage Funding Corporation
Safe Corporation
SAF Insurance Corporation of Delaware
Kemper Investors Life Insurance Company
KILICO Realty Corporation
Galaxy Offshore, Incorporated
Loewi Financial Companies, Incorporated
Blunt Ellis & Loewi Incorporated
Loewi Advisory Services, Incorporated
Loewi Management Corporation
Beta Systems, Incorporated
B.E.L. Capital Corporation
Loewi Managed Accounts Services, Incorporated
Municipal Funding, Incorporated
Peers Holdings, Incorporated
Peers & Company
PH II, Incorporated
Peers Capital Corporation
Prescott Holdings, Incorporated
Prescott, Ball & Turben, Incorporated
Greystone Mortgage Group, Incorporated
Prescott Capital Markets, Incorporated
Carnegie Administration Corporation

BJVC Emergency Management Corporation
BJVC Real Estate Corporation
Selected Financial Services, Incorporated
Prescott Travel, Incorporated
Prescott Lease Services, Incorporated
Prescott Realty Services, Incorporated
1331 Advisers, Incorporated
PMB Corporation
Carnegie Capital Management Company
Carnegie Fund Distributors, Incorporated
Batehill, Incorporated
BEHRLEASCO, Incorporated
Batehill Leasing Corporation
Bateman Eichler, Hill Richards Realty Services, Incorporated
Bateman Eichler, Hill Richards Housing Investors, Incorporated
Bateman Eichler, Hill Richards Realty Company, Incorporated
Intercapital Group
BEHR Futures Management Corporation
BEHR Technology Management Corporation
BEHR Venture Management Corporation
Bateman Eichler, Hill Richard Overseas, B.V. (Netherlands)
Bateman Eichler, Hill Richards, Inc.,
Boettcher Investment Corporation
Boettcher & Company, Incorporated
Boettcher Insurance Agency
Boettcher Insurance, Incorporated
Forecaster Company
BPL Holdings, Incorporated
Case Management, Incorporated
MWG Holdings, Incorporated
Lovett Mitchell Webb & Garrison, Incorporated
Gulf Texas Investment Corporation
Federal Street Equities, Incorporated
Federal Street Managers, Incorporated
Dove Associates, Incorporated
Gulfstream Management, Incorporated
Gulfstream Financial Associates, Incorporated
International Business Management, Incorporated
Kemper Capital Markets, Incorporated
Ose, Sample, Lynch & Company
Kemper Clearing Corporation
Investors Fiduciary Corporation
Kemper Currency, Incorporated

Kemper Real Estate, Incorporated
Kemper Service Company
American Motorists Insurance Company

American Protection Insurance Company
AMICO Realty Corporation
BBC Associates, Incorporated
KAA1 PGA Sales, Incorporated
American Underwriting Corporation
Associated Mutuals, Incorporated
Central Mortgage Company
Kemper Realty Corporation
Kemper International Corporation
Kemper Management Company, Ltd. (Bermuda)
Kemper Insurance Company Limited (Australia)
Kemper, S. A. (Belgium)
Kemper Conservation Industrielle, S.A. (Belgium)
Kemper International Insurance Company (PET) (Limited Singapore)
The Seven Continents Insurance Company Limited (Bermuda)
American Manufacturers Mutual Insurance Company
Fidelity Life Association
Florida Realty Corporation
Kemper Lloyds Insurance Company
The James S. Kemper Foundation
Kemper Corporation
Federal Kemper Insurance Company
Mound Agency, Incorporated
Mound Agency of W. Virginia, Inc.
FKLA Realty Corporation
Galaxy Offshore, Incorporated
Kemper Reinsurance Company
Kemper Reinsurance (Bermuda) Limited
Kemper Europe Reassurances, S. A. (Belgium)
Kersa Holding Company, Luxembourg
Kemper Reinsurance London, Ltd.
American Insurance Agency Pty. Ltd. (Australia Dormant)
Economy Fire & Casualty Company
Economy Preferred Insurance Company
Economy Premier Assurance Company
Premier Assurance Center, Incorporated
National Loss Control Service Corporation
National Loss Control Service Corporation (Canada) Ltd.
Kemperco, Incorporated (Ill. Dormant)

Kemper/Bedford Properties, Incorporated
Kaiser Development Company
Kaiser Hawaii Kai Development Company

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page:

STATUTES AND RULES:

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Petitioner,

v.

EDMUND J. BODINE, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Federal Kemper Life Assurance Company ("Kemper"), petitions for a Writ of Certiorari to review the Judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered September 26, 1990 and rendered by denial of rehearing on November 15, 1990.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 912 F.2d 1373, and is Appendix A of this Petition. (A. 1-10). (Slip opinion as prepared by West Publishing Co.).

Appendix B, (A. 11-19) is a partial summary judgment in favor of Kemper, entered in the United States District Court, Middle District of Florida on January 23, 1989. This order eliminated all liability claims except that of negligent failure to cancel a policy of insurance, and all damage claims except for lost earnings and expenses, including "...the final issue of any claim for negligent infliction of emotional damages." (A. 18).

Appendix C, (A. 20-25), is an order entered by the District Court Visiting Trial Judge reinstating the claim for negligent infliction of emotional distress.

JURISDICTION

The opinion and Judgment sought to be reviewed were entered September 26, 1990, Appendix A, (A. 1-11), and was rendered upon the denial of a timely petition for rehearing by order dated November 15, 1990. Appendix D, (A. 26). Pending a motion to stay which was not ruled upon, the mandate issued December 4, 1990. Appendix J, (A. 35). This Petition for Writ of Certiorari has been filed within ninety days of the denial of rehearing. This Court's jurisdiction is invoked under §28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

Appendix I, (A. 32-33), contains the following statutes and Court Rules involved in the consideration of this Petition: 28 U.S.C. §1652, (A. 32); § 25.031, *Fla. Stat.* (1989), (A. 32); Fla.R.App.P. 9.150, (A. 32); 11th Cir.R. 35-3, (A. 33).

STATEMENT OF THE CASE

A. District Court Jurisdiction.

Jurisdiction of the United States District Court, Middle District of Florida, was predicated upon diversity of citizenship. 28 U.S.C. §1332.

B. Facts And Procedural History.

Respondent, Edmund J. Bodine, Jr. ("Bodine"), brought a diversity action in the United States District Court for the Middle District of Florida against Kemper and others. Only the case against Kemper went to trial. The claim was predicated upon *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983), involving the tort of *negligent* failure to cancel an insurance policy under circumstances where the insurer has actual knowl-

edge that the beneficiary plans to murder the insured to collect the policy benefits.

On January 23, 1989, the Honorable Elizabeth A. Kovachevich, the District Judge originally assigned to the case, entered a partial summary judgment in favor of Kemper. Appendix B, (A. 11-19). That order dispensed with all liability claims and theories except the issue of *negligence* under the *Lopez* claim in Count II of the Third Amended Complaint, the only count against Kemper. (A. 15-16). The order then addressed some of the various damage claims and granted Kemper summary judgment on the claim for punitive damages (A. 17), intentional infliction of emotional distress (A. 18), *and* "...as to *any claim* for negligent infliction of emotional damages." (Emphasis added). (A. 18-19).[1]

The case was then assigned to the Honorable Clarence C. Newcomer, Visiting Judge, for trial. On the first day of trial, Judge Newcomer revisited the prior summary judgment on the issue of negligent infliction of emotional distress damages. Judge Newcomer reinstated that element of damage, holding that the prior order had not eliminated emotional distress damages, and that emotional distress damages were recoverable under a *Lopez* claim, even in the absence of any impact. Appendix C, (A. 20-25).

Although specifically recognizing that "...this modified "impact rule" does not apply to the cause of action before me now,..." (A. 23), Judge Newcomer's reason for failing to follow Florida's impact rule was that, in *Lopez,* the Supreme Court of Florida created a "new tort" in Florida. Under that rationale, Judge Newcomer applied Florida's limited modification of the

[1] Count II also sought damages for lost earnings and expenses which were not addressed in the motion or order, and which remained to be tried along with the issue of negligence.

requirement of impact announced in *Champion v. Gray,* 478 So.2d 17 (Fla. 1985). (A. 23-25).[2]

At trial, the Jury awarded damages of: $75,000 lost earnings; $2,000 out-of-pocket expenses; and $2,000,000 emotional distress "pain and suffering" damages. The Jury found that Kemper was 75% negligent and Bodine 25% negligent, and the Amended Judgment reduced the total award by 25%. Appendix E, (A. 27). Kemper filed a timely alternative Motion for New Trial, Motion for Remittitur and Motion For Judgment Notwithstanding the Verdict, which was denied by order dated May 30, 1989. Appendix F, (A. 28).

On appeal, the Eleventh Circuit affirmed the finding of negligence by the Jury and sanctioned Judge Newcomer's revisiting of the prior partial summary judgment and his refusal to apply Florida's impact rule in a *Lopez* claim. However, the Circuit Court ordered a remittitur of $1,000,000 of the Jury's pain and suffering award or, in the alternative, a new trial on the sole issue of damages for pain and suffering. Appendix A, (A. 1-11).

The opinion adopted Judge Newcomer's reasoning. The decision sought to be reviewed applied *Champion, supra,* and refused to recognize that the Supreme Court's decision in *Champion* was specifically limited to a circumstance where a plaintiff suffers psychic trauma resulting from negligent injury of another. Appendix A, (A. 5-9).

For the purposes of Florida's "impact" rule as addressed in this Petition, the opinion sought to be reviewed, Appendix A, (A. 2-3), adequately sets forth the underlying facts upon which the Jury could have found that Kemper was negligent in failing to cancel the policy by November 11, 1983.

---

[2] As recognized in *Sgruos v. Biscayne Recreational Development Company,* 528 So.2d 376 (Fla. 3rd DCA 1987), pet. denied 525 So.2d 880 (Fla. 1988), *Champion* (and a collateral case, *Brown v. Cadillac Motor Division,* 468 So.2d 903 (Fla. 1985)), were specifically limited by the Supreme Court of Florida to circumstances involving emotional distress over death or injury to one *other than the plaintiff. Champion,* 478 So.2d at 19, 20.

As the opinion sought to be reviewed necessarily recognizes, Bodine suffered no "impact" much less *any* physical injury. The assassin allegedly hired by William Stroup, the beneficiary, was apprehended, tried and convicted. Stroup was later apprehended and acquitted of any criminal charges.

Bodine did not consult any physician until January 27, 1987, well after filing suit against Kemper. Bodine gave that psychiatrist *no* history of *any* physical illness. The psychiatrist testified only that Bodine had a mixed anxiety depression, or paranoid disorder, and referred to Bodine "...sweating profusely, crying and shouting."

Bodine testified that on November 7, 1983, he became sick at the house of his partner, Yordan, and testified generally about "...a rash a few days after visiting Yordan." This was prior to the November 11, 1983 date cited in the opinion, Appendix A, (A. 3), as the date upon which the Jury could have found that Kemper had sufficient knowledge of the plot and time to investigate, and should have canceled the policy.

Bodine testified that he experienced panic reactions when he found out, after November 11, 1983, that the policy had not been canceled. It was undisputed that Bodine did not know the policy had not been canceled until December 2, 1983. As reflected in the opinion's discussion of the remittitur issue, Appendix A, (A. 9), on and after November 7, 1983 Bodine was upset over the discovery of the murder plot itself by the FBI. Prior to November 7, 1983, the authorities had cautioned Bodine not to talk to anyone. However, he contacted Stroup prior to the discovery that Stroup was the alleged initiator of the plot.

Kemper timely filed a Petition For Rehearing and Request

For Certification[3] of Dispositive Issues of Law to the Supreme Court of Florida. The Petition For Rehearing was denied on November 15, 1990. Appendix D, (A. 26). A separate Order of November 15, 1990 denied the Request For Certification of Dispositive Issues of Law to the Supreme Court of Florida. Appendix G, (A. 29). On November 15, 1990 the Eleventh Circuit also denied Bodine's Motion to Stay the Mandate pending a Petition for Writ of Certiorari to this Court challenging the remittitur. Appendix H, (A. 30).

REASONS FOR GRANTING THE WRIT

WITH RESPECT TO DISPOSITIVE ISSUES OF THE RIGHT TO A CAUSE OF ACTION FOR PSYCHIC INJURY IN FLORIDA, THE OPINION SOUGHT TO BE REVIEWED SUBSTITUTES ITS VIEW OF WHAT THE LAW OF FLORIDA SHOULD BE RATHER THAN APPLYING UNAMBIGUOUS RULES OF DECISION ESTABLISHED BY THE SUPREME COURT OF FLORIDA, IN VIOLATION OF *ERIE RAILROAD CO. V. THOMPKINS,* 304 U.S. 64, 82 L.Ed 1188, 58 S.Ct. 817 (1938), JUSTIFYING THIS COURT'S EXERCISE OF ITS DISCRETIONARY POWER OF SUPERVISION.

There is direct conflict with *Erie Railroad Company v. Thompkins,* 304 U.S. 64, 82 L.Ed. 1188, 58 S.Ct. 817 (1938) and its progeny. The opinion facially establishes the failure to apply controlling rules of decision of the Supreme Court of Florida

---

[3] *See* §25.031, *Fla. Stat.* (1989); Fla.R.App.P. 9.150; Appendix I, (A. 32, 33). The Request For Certification included the following issues, the second would have been dispositive under the undisputed evidence of the character of Bodine's injuries if the impact rule were not applicable, and involved the requirements and definition of "objectively discernible physical impairment" as set forth by the Supreme Court of Florida in *Brown, supra:*

1. Is impact necessary for recovery of emotional distress damages on a claim predicated upon *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983)?

2. Assuming that impact is not necessary, what are the necessary elements for establishing a claim for emotional distress damages in a negligence action predicated upon *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983)?

regarding impact as a prerequisite to recovery for emotional distress damage by one put in fear of his own safety by another's negligence. The opinion further ignores the Supreme Court of Florida's mandate that *any* cognizable cause of action for negligent infliction of emotional distress requires "objectively discernible physical impairment." This violation of *Erie* is so evident that this Court should exercise its power of supervision. U.S. S.Ct. R. 10.1 (a).

In *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983), the Supreme Court of Florida recognized a negligence cause of action by an insured against his insurance company for failure to cancel a policy of life insurance where the insurer had actual knowledge of a death threat against the insured by the beneficiary of the policy. As noted in the underlying decision in *Lopez v. Life Insurance Company of Georgia,* 406 So.2d 1155, 1160 (Fla. 4th DCA 1981), because there was impact upon Lopez through the attempt to carry out the murder plot, there was no need for the Supreme Court of Florida to address the elements necessary to the claim for emotional distress damages.

Nevertheless, at the time *Lopez* was decided the requirement that any plaintiff suffer some actual physical "impact" was a necessary prerequisite to recovery of emotional distress damages stemming from mere negligence. *E.g., Gilliam v. Stewart,* 291 So.2d 593 (Fla. 1974), quashing *Stewart v. Gilliam,* 271 So.2d 466 (Fla. 4th DCA 1972), in which the District Court rejected the impact rule in circumstances where the Plaintiff suffered a heart attack after seeing a car crash into her home. *See also, Diaz v. Eastern Airlines, Inc.,* 698 F.Supp. 18 (D. Puerto Rico 1988).

The Supreme Court of Florida modified the impact rule in the collateral cases of *Champion v. Gray,* 478 So.2d 17 (Fla. 1985) and *Brown v. Cadillac Motor Division,* 468 So.2d 903 (Fla. 1985). That modification was unambiguously made applicable only to factual situations different from the present case and *Lopez.*

In the lead decision in *Champion,* the Plaintiff heard the

impact of a drunken driver's car which struck and killed her daughter. She immediately went to the accident scene, and was overcome with shock, collapsed and died. In circumstances involving simple negligence, the Supreme Court of Florida unmistakably expressed that it recognized *two distinct emotional* circumstances, fear for one's *own* safety, and anxiety or stress over injury or death *of another*. 478 So.2d at 19. It specifically cited and quoted from *Gilliam, supra,* and relaxed the requirement of impact only as to circumstances involving emotional damages occasioned by injury to a close family member or one having a close relationship with the plaintiff:

> We now conclude, however, that the price of death or significant discernable physical, injury, when caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact before a cause of action exists. We emphasize that the requirement that a causally connected, clearly discernable physical impairment must accompany or occur within a short time of the psychic injury. (Footnotes omitted).
>
> [478 So.2d at 18-19]

In *Brown, supra,* issued the same day *Champion* was issued after rehearing, the Supreme Court of Florida refused to allow the Plaintiffs to recover for emotional distress damages where General Motors' negligence resulted in the malfunctioning of an automobile causing the driver to strike and kill *his own mother*. *Brown* reaffirmed the limited nature of the modification of the impact rule, and further refined the element of "discernible physical impairment":

> The distinct court of appeal, noting that Florida retains the impact rule, vacated the Browns' judgment. The wrongful death judgment for the mother was undisturbed.
>
> We are thus presented the question of whether a person who suffers no physical injuries in an accident has a

> cause of action for mental distress or psychic injury caused by the tortious event. *We hold that such psychological trauma must cause a demonstrable physical injury such as death, paralysis, muscular impairment, or similar objectively discernible physical impairment before a cause of action may exist. We hold that there is no cause of action for psychological trauma alone when resulting from simple negligence.*
>
> In a parallel case, *Champion v. Gray,* No. 62,830 (Fla. Mar. 7, 1985), we modified, *in some limited situations,* the requirement of an impact as a basis for a cause of action in negligence. We did not and do not, however, abolish the requirement that a discernible and demonstrable physical injury must flow from the accident before a cause of action exists.
>
> Mr. Brown presented expert testimony at trial on the issue of a psychiatric disability, but failed to show a direct physical injury or any physical injury resulting from his mental distress. Mr. Brown cannot meet the requirements of *Champion* and has no recognizable cause of action. The decision of the district court vacating the Browns' judgments is approved. (Emphasis added).

On rehearing, (clarifying that the cause of action for the injuries addressed in *Champion* was direct, separate and not derivative), the Supreme Court of Florida again stated in *Champion:*

> In this case we have emphasized that a physically traumatized person must manifest a discernible physical injury before that person has a claim resulting from *injuries inflicted on another.* A separate and distinct physical injury is required. We have specifically rejected purely emotional distress claims. *Brown v. Cadillac Motor Car Division,* 468 So.2d 903 (Fla. 1985). (Emphasis added).
>
> [478 So.2d at 22.]

The limited modification of Florida's impact rule was directly addressed and recognized in *Sgruos v. Biscayne Recreational*

Development Co., 528 So.2d 376 (Fla. 3rd DCA 1987), pet. denied 525 So.2d 880 (Fla. 1988)[4], which involved a widow's action for *wrongful death* of her husband stemming from negligence of a company providing security services at a marina. Her husband died because of a heart attack which he suffered when intruders gained entry and boarded the boat as a result of the company's negligence. The Third District Court of Appeal of Florida held that the impact doctrine barred recovery for the death under *any* theory of negligent infliction of emotional distress:

> Nor is the instant case within the parameters of the narrow exception to the impact rule developed by the Florida supreme court in *Champion v. Gray,* 478 So.2d 17 (Fla. 1985). In *Champion,* the court modified the impact rule to recognize a cause of action for a plaintiff who suffers a "significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured." Id. at 20. Pursuant to this modification, the personal representative of the estate of a woman who died of shock from the psychic trauma of seeing the body of her dead daughter at the automobile accident scene could maintain a negligence action against the driver of the car. Without disapproving *Gilliam,* the court fashioned a dichotomy between "two distinct emotional circumstances." Id. at 19. The first case involved fear for one's own safety as exemplified by *Gilliam.* The second case involved anxiety or stress for the injury or death of another, e.g., the case present in *Champion. The court specifically restricted a cause of action to the second category. Peter Sgruos's death unmistakably falls into the first category, thus barring his estate's recovery for BRD's negligence for Peter's death.* (Emphasis added).

---

[4] *See also, Crenshaw v. Sarasota County Public Hospital Board,* 466 So.2d 427 (Fla. 2nd DCA 1988); *In re Eastern Airlines, Inc. Engine Failure,* 629 F.Supp. 307, 309-310 (S.D. Fla. 1986), rev'd *Floyd v. Eastern Airlines, Inc.,* 872 F.2d 1462 (11th Cir. 1989), cert. granted _____ U.S. _____, 110 L.Ed. 2d 266, 110 S. Ct. 2585 (1990). *Floyd* was effectively disapproved as to its discussion of emotional distress damages recoverable in Florida in *Eastern Airlines, Inc. v. King,* 557 So.2d 574 (Fla. 1990), overruling *King v. Eastern Airlines, Inc.,* 536 So.2d 1023 (Fla. 3rd DCA 1988), upon which *Floyd* relied.

[528 So.2d at 379]

When *Brown, Champion* and *Sgruos,* are read together, there is no "principled"[5] argument which will support the opinion's holding that present Florida law allows recovery of emotional damage to one in Bodine's position. When the opinion in this case is examined in light of these decisions, it unfortunately becomes evident that the opinion chooses to substitute a view of what the law of Florida *should be,* rather than applying rules of decision established by the Supreme Court of Florida.

This Court certainly does not need to be instructed on the requirements of the "*Erie* doctrine." In diversity cases, the *Erie* doctrine is a rule of absolute comity where there is no intellectually principled basis to refuse to recognize and apply state law. As stated in *Day & Zimmerman, Inc. v. Challoner,* 423 U.S. 3, 4, 96 S.Ct. 167, 46 L.Ed. 2d 3 (1975):

> A federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

Under *Erie,* as recognized in *Felder v. Casey,* 487 U.S. 131, 151, 101 L.Ed. 2d 123, 108 S.Ct. 2302 (1988), quoting from *Guaranty Trust Co. v. York,* 326 U.S. 99, 109, 89 L.Ed. 2079, 65 S.Ct. 1464 (1945):

> When a federal court exercises diversity or pendent jurisdiction over state-law claims, "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a state court."

See also, Ferens v. John Deere Co., 494 U.S. _____, 108 L.Ed. 2d, 443, 453, 110 S.Ct. 1274 (1990) (*Erie* is ". . . a vital expression of the federal system and concomitant integrity of the separate States."); 28 U.S.C. §1652. Appendix I, (A. 33).

---

[5] *See,* Appendix A, (A. 7) quoting Appendix C, (A. 24), from which this characterization is borrowed.

The refusal to apply existing Florida law presented by the opinion sought to be reviewed is aptly demonstrated by its attempt to distinguish *Sgruos, supra.* Appendix A, (A. 8, n. 6,7). The opinion can only be characterized as turning a blind eye to the unambiguously stated basis of the *Sgruos* decision.[6] Quoted, *supra,* pp. 10-11.

To even a casual reader, it is evident that *Sgruos, Lopez, Champion* and *Brown,* were actions based upon simple negligence. It is factitious to say that *Sgruos* involved an "ordinary" claim for negligent infliction of emotional distress and this case does not. The attempt to equate this case with *Champion,* to the exclusion of *Sgruos,* totally breaks down when one considers *Brown,* which is not even mentioned in the opinion. Certainly, *Brown* and *Champion* do not involve "an ordinary claim for negligent infliction of emotional distress..." under any meaningful use of that phrase in footnote 7 of the opinion.

With respect to *Lopez,* the opinion states that "...the likelihood of fraudulent claims of psychic trauma is mitigated by the fact that emotional distress is very reasonable under such circumstances." Appendix A, (A. 8). This argument, as a basis for equating *Lopez* and *Champion,* but ignoring *Brown* and *Sgruos,* more than sufficiently demonstrates that the opinion substitutes a judgment of which should be the law in Florida, rather than following controlling precedent of the Supreme Court of Florida, contrary to the duty of a federal court sitting in diversity.

In ignoring the actual rule of decision of *Champion* and

---

[6]Even absent the clear limiting language of *Champion, Sgruos* itself is binding precedent in the Eleventh Circuit. *Silverberg v. Paine Webber, Jackson & Curtis, Inc.,* 710 F.2d 678, 690 (11th Cir. 1983) (federal court in diversity bound to adhere to any decisions of intermediate appellate courts "...absent some persuasive indication that the state's highest court would decide the issue otherwise," whether or not it agrees with the reasoning upon which the state court's decision is based). The opinion in this case is not rationally or otherwise persuasive, and certainly is not indicated by any Florida decision.

Sgruos, in favor of a rationale that "...the fact of the emotional distress is very reasonable..." under a *Lopez* circumstance as its basis for what is an effective abrogation of the impact doctrine, the opinion adopts a "reasonable foreseeability" standard which was specifically rejected by the Supreme Court of Florida in *Champion.*

In *Champion, Brown* and *Sgruos,* the Supreme Court of Florida had ample opportunity to replace the impact rule in favor of a doctrine of weighing the "foreseeability" and/or "reasonableness" of the circumstances with respect to negligence causing psychic injury. *It chose not to.* In *Champion,* the Supreme Court *refused* to apply the type of pure foreseeability which the present opinion engrafts upon the law of Florida. It clearly limited its decision to the exact circumstances which it described. The only "non-traditional cause of action" was a modification of the impact damage rule with respect to damages "...caused by psychic injury following an injury *to another.*" 478 So.2d at 20:

> Foreseeability is the guidepost of any tort claim. *Because we are dealing with an unusual and non-traditional cause of action in allowing damages caused by psychic injury following an injury to another,* however, public policy comes into play and some outward limitations need to be placed on the pure foreseeability rule. (Emphasis added).

The Supreme Court of Florida's final holding in *Champion* again left no room for dispute concerning the factual limitation placed upon its modification of the "actual impact" doctrine:

> The complaint in the case sub judice alleges that Mrs. Champion heard the accident, came immediately to the accident scene, and suffered severe emotional distress and shock which led to her death shortly after seeing her injured child. The requirements set out in this opinion have been met. No physical impact to her need be alleged because she suffered a discernable physical injury (death).
>
> Accordingly, we answer the certified question, as limited, in the affirmative. We hold that a claim exists

> for damages flowing from a significant discernible physical injury when such injury is *caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing that injury, is foreseeably injured.* 4
>
> ---
>
> 4 We *reiterate* that a claim for psychic trauma unaccompanied by discernible bodily injury, *when caused by injuries to another* and not otherwise specifically provided for by statute, *remains nonexistent.* (Emphasis added).
>
> [478 So.2d at 20]

This Court should not overlook the fact that the majority of the *Sgruos* Court, expressing their own distaste for the impact rule, applied the clear mandate of *Champion* in the face of an impassioned dissent arguing the application of a pure "reasonable foreseeability" test. That dissent also attempted to expand the traditional malice and intentional tort exceptions to the impact rule in order to avoid the majority's recognition of the *Champion* rule of decision, which holding the dissent did not dispute.

In requiring "objectively discernible physical *impairment,*" as defined in *Brown,* and that the plaintiff have a close emotional attachment to *another person* who is negligently injured, and that "...the psychically injured party should be directly involved in the event causing the original injury...." *Champion,* 478 So.2d at 20, the Supreme Court of Florida created specific elements necessary to establish a separate and distinct cause of action for emotional distress caused by injury *to another.* The elements of that distinct cause of action *substitute* for the *continuing* requirement of actual "impact" on a plaintiff asserting the separate and distinct cause of action for psychic damage based on being negligently placed in fear for his *own* life and/or safety. The Supreme Court of Florida required such a substitution because:

> ...in our view it is necessary to curb the potential for fraudulent claims, and to place some boundaries on the indefinable and immeasurable psychic claims.

[478 So.2d at 20]

Even if the cause of action recognized by the Supreme Court of Florida in *Champion* and *Brown* was not limited to psychic injuries caused as a result of injury to another, and could be applied to one in Bodine's position, the opinion sought to be reviewed further evidences its mere dissatisfaction with established Florida law by totally ignoring the Supreme Court of Florida's precise definition of an "...objectively discernible physical impairment," as a substantive element of that cause of action. *Brown,* quoted, *supra,* p. 9.

Even if one includes the instance of his "getting sick" on November 7, 1983, prior to both the December 2, 1983 date when he learned the policy had not been canceled, and the November 11, 1983 date which the opinion recognizes was the first date upon which Kemper had sufficient information to cancel the policy, as a matter of law Bodine's "injuries" do not amount to

> ...such psychological trauma [which causes]...a demonstrable physical injury such as death, paralysis, muscular impairment, or similarly objectively discernible physical impairment...,

which must be present "...before a cause of action may exist." *Brown, supra.*

Kemper recognizes that in the Eleventh Circuit "...the test to be applied in diversity cases to determine the sufficiency of the evidence for submission of a case to the jury is a matter of federal law." *Daniels v. Twin Oaks Nursing Home,* 692 F.2d 1321, 1334 (11th Cir. 1982). However, the failure to even mention *Brown,* or the *undisputed* character of Bodine's "injuries," which manifestly do not meet the *Brown* criteria, coupled with the opinion's attempt to bolster its position by arguing the "reasonableness" of psychic injury in a *Lopez* situation, again leads only to the conclusion that the opinion could not directly address the issue because to do so would further establish a decision simply to ignore the law of Florida and to substitute an opinion of what

the law should be for that expressed by the Supreme Court of Florida.[7]

When the facts of this case are compared to the facts in *Brown,* the question naturally arises: Did the opinion fail to openly address *Brown* because it was not believed that "...emotional distress is very reasonable under such circumstances," or because the opinion cannot reconcile *Brown, Champion* and this case without ignoring the law of Florida? Is it not "very reasonable" that the plaintiff in *Brown,* who ran over and killed his *own mother* because of General Motors' negligence, would experience "real" emotional distress? Was the death from fright in *Sgruos* not "real" enough?

Was it in fact rationally impossible to discuss the character and extent of Bodine's injuries under the *Brown* element because, as recognized in the portion of the opinion dealing with the remittitur, Appendix A, (A. 6-7), "...much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy..."? This undisputed fact reinforces the reason why the Florida Supreme Court did not abrogate the impact rule as to plaintiffs such as Bodine, and established strict substantive elements, including that of "objectively discernible physical impairment" to substitute for actual impact with respect to plaintiffs suffering psychic trauma resulting from negligently imposed injuries upon another.

It was the sole province of the Supreme Court of Florida to decide that neither "reasonableness" of circumstances, pure "foreseeability" of possible psychic injury, nor the character of

---

[7] As in *Sgruos, Brown,* and *Champion,* virtually every other case which has examined or dealt with the necessary element of objectively discernible physical impairment has identified the character of the injuries which either do or do not meet the standard. *E.g., Crenshaw, supra; In re Eastern Airlines, Inc., Engine Failure, supra; Brenner v. Professional Service Industries, Inc.,* 710 F.Supp. 1336 (N.D. Fla. 1989). The failure of the opinion to even address this essential element of *any* cause of action for emotional distress predicated on negligence is merely symptomatic of its primary fault - the refusal to apply Florida law in violation of *Erie.*

the duty which is breached by an act of simple negligence,[8] are *not* sufficient "principled thresholds", to support a cause of action. Appendix A, (A. 7). The "bright line" elements of "impact" with respect to plaintiffs who claim direct psychic injury based on fear for their own safety, and the equally rigid *Champion - Brown* elements with respect to plaintiffs claiming psychic injury based on injury to *another,* are indeed necessary to curb possible fraudulent claims of psychic injury and to place "boundaries" on the *indefinable* and *immeasurable* psychic claims." *Champion,* at 20.

In determining whether it should exercise its discretionary jurisdiction in this case, this Court should consider that Kemper had no choice with respect to being sued in a federal forum. *Compare, Seaboard Surety Company v. Garrison, Webb & Stanland,* 823 F.2d 434, 438 (11th Cir. 1987) (litigant selecting federal forum over state forum refused certification of dispositive issues).

The failure to certify the dispositive issues in this case to the Supreme Court of Florida is inexplicable. Notwithstanding the clarity of *Champion, Brown* and *Sgruos,* Florida's certification procedure embodied in §25.031, Florida Statutes (1989) and Florida Rule of Appellate Procedure 9.150, Appendix I, (A. 32, 33), was enacted for the specific purpose of clarifying any ambiguities which might exist in Florida law, and to eliminate the need for federal courts to *"Erie* guess" the result which would have been obtained had the case been tried in the state courts.

This exercise of "discretion" certainly does not serve to ameliorate the inevitable conclusion of a direct violation of the *Erie* doctrine. The open conflict represented by the opinion itself, the refusal to certify the case to the Supreme Court of Florida, coupled with the fact that Eleventh Circuit Rule 35-3, specifically excludes "...errors in a panel's determination of state law..." from cases eligible for *in banc* consideration...", Appendix I,

---

[8] All of which are invoked by the opinion, as with the dissent in *Sgruos,* as alternative "principled thresholds" for avoiding confrontation with the unambiguous language of *Champion* and *Brown.*

(A. 33), sends an unfortunate message that state rules of decision in diversity cases may well be orphans in a foreign land if a particular panel chooses to disagree with the rationale of such rules.

While determination of this cause was pending in the Eleventh Circuit, the Supreme Court of Florida reaffirmed its "affinity" with the impact rule, except for the narrow exceptions carved out in *Brown* and *Champion,* as recognized in *Sgruos.* In *Eastern Airlines, Inc. v. King,* the Court was involved with a claim of intentional infliction of emotional distress. However, in reversing the *in banc* decision of the Third District Court of Appeal (relied upon by the Eleventh Circuit in *Floyd v. Eastern Airlines, Inc., supra; see* p. 10, n.4 *supra*) it adopted the view expressed in the dissent of Judge Schwartz in the underlying case:

> In essence, the majority view amounts to establishing an exception to the recently reaffirmed "impact rule," *Brown v. Cadillac Motor Car Div.,* 468 So.2d 903 (Fla. 1985), which would arise in every case in which the defendant acts recklessly. It would apply when, for example, a highly intoxicated driver recklessly operates his vehicle and narrowly misses but severely frightens a plaintiff, or when a plaintiff uses and becomes mentally concerned over some potential harm, but is not actually "impacted" or physically injured by a product - like a Mustang or a Dalkon Shield - which may have been recklessly manufactured. Whatever the law of Florida may previously have been, *see Crane v. Loftin,* 70 So.2d 574 (Fla. 1954) (dictum); *Kirksey v. Jernigan,* 45 So.2d 188 (Fla. 1950) (dictum), it is very clear that there is no such exception under the present law of our state. (Emphasis added).
>
> [536 So.2d at 576-577][9]

The above quote aptly describes exactly what has occurred in the present case. *Lopez* created no "new tort." It recognized

---

[9] Moreover, Justice Ehrlich's concurring opinion in *King,* 557 So.2d at 579-580, specifically citing *Brown,* and *Champion,* further evidenced that with respect to emotional distress damages predicated upon any form of simple negligence and involving one's own safety, the impact rule applies in Florida.

a cause of action based upon simple negligence. In Florida, a plaintiff suffering pure psychic injury from being placed in fear of his life because of simple negligence has no cause of action for psychic injury damages absent impact. New factual circumstances found to amount to *simple negligence* which causes psychic injury do not open the door to engrafting further exceptions to the impact rule other than as clearly delineated in *Champion,* reasserted in *Brown,* and recognized in *Sgruos.*

In determining whether to exercise its discretionary jurisdiction and review this case, it is respectfully submitted that this Court should not overlook the fact that the basis of a decision directly affects the public's perception of the integrity and fairness of the judicial system.

It is manifestly evident that Florida rules of decision established by the Supreme Court of Florida have been ignored in favor of engrafting "...exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which a federal court sits, ...", *Day, supra.* More is involved in this case than a mere "conflict" with the requirements of *Erie.* This Court's power under the "supervisory clause" of Supreme Court of the United States Rule 10.1 (a) should be exercised.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the Judgment and decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

TED R. MANRY, III
(Counsel of Record)
CHARLES W. PITTMAN of
MACFARLANE, FERGUSON, ALLISON
& KELLY
Post Office Box 1531
Tampa, Florida 33601
813/223-2411

ATTORNEYS FOR FEDERAL KEMPER
LIFE ASSURANCE COMPANY,
Petitioner

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1990

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Petitioner,

v.

EDMUND J. BODINE, JR.,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

TED R. MANRY, III
(Counsel of Record)
CHARLES W. PITTMAN of
MACFARLANE, FERGUSON, ALLISON
& KELLY
Post Office Box 1531
Tampa, Florida 33601
813/223-2411

ATTORNEYS FOR FEDERAL KEMPER
LIFE ASSURANCE COMPANY,
PETITIONER

INDEX TO APPENDIX

APPENDIX A

Edmund J. BODINE, Jr.,
Plaintiff-Appellee,

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY,
Defendant-Appellant.

No. 89-3481.

United States Court of Appeals,
Eleventh Circuit.

Sept. 26, 1990.

Insured sued his insurer for insurer's alleged negligence in failing to cancel a key man life insurance policy despite its knowledge that a beneficiary was attempting to murder insured to collect the policy benefits. The United States District Court for the Middle District of Florida, No. 851814-Civ-T-17, Clarence C. Newcomer, Visiting Judge, entered judgment on a jury verdict for insured, and insurer appealed. The Court of Appeals, Anderson, Circuit Judge, held that: (1) damages for pain and suffering or emotional distress were not precluded by a pretrial ruling; (2) under Florida law, the significant discernible physical injuries rule was applicable to the emotional distress injuries; and (3) the maximum damages for pain and suffering which the jury could have found was $1,000,000.

Affirmed in part, vacated in part, and remanded with instructions.

1. Federal Civil Procedure 1940

Pretrial order dismissing insured's claim against insurer for negligent infliction of emotional distress did not preclude damages for pain and suffering or emotional distress under insured's *Lopez* claim, in which insured sought damages for insurer's negligent failure to cancel insurance policy despite insurer's knowledge that beneficiary was attempting to murder insured to collect policy benefits.

2. Damages 50

As general rule, Florida law precludes recovery for emotional

distress injuries caused by defendant's negligence in absence of physical impact to claimant.

3. Damages 56.10

Under Florida law, plaintiff must show discernible physical injuries in order to recover for emotional distress under *Lopez* claim, arising from insurer's negligent failure to cancel insurance policy despite knowledge that beneficiary is attempting to murder insured to collect policy benefits.

4. Damages 56.10

Maximum amount insured could have recovered for insurer's negligent failure to cancel insurance policy despite insurer's knowledge that beneficiary was attempting to murder insured to collect policy benefits was $1,000,000.

Appeal from the United States District Court for the Middle District of Florida.

Before HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

ANDERSON, Circuit Judge.

Edmund Bodine sued Federal Kemper Life Assurance Company ("Kemper") in federal district court under that court's diversity jurisdiction. The claim upon which relief was granted is known as a *Lopez* claim. In *Life Ins. Co. of Georgia v. Lopez*, 443 So.2d 947 (Fla.1983), the Florida Supreme Court recognized the tort of negligent failure to cancel an insurance policy where the beneficiary attempts to murder the insured to collect the policy benefits and where the insurer has actual notice of the murder plot.

In this case, the FBI uncovered a plot to murder Bodine. Initially, no one was certain who was arranging Bodine's death. However, it was discovered that William Stroup, one of Bodine's partners, was behind the plot to murder Bodine so that his company, Cayman Films, Ltd., would collect on the $2,000,000 key man life insurance policy which Kemper had issued on Bodine's life. Philip Yordan, another partner whose life was also in danger, and Bodine called Kemper on November 7, 1983, and demanded that Kemper cancel the insurance policies on both of their lives. There was evidence from which the jury could have reasonably found that by early November 1983, Kemper had actual

notice of facts sufficient to trigger its duty under *Lopez*. By that time, Kemper had been notified of the murder plot against Bodine and of the fact that the insurance was a likely motive. By that time, Kemper either had received verification of this from appropriate law enforcement personnel, or could have upon appropriate investigation. Nevertheless, Kemper did virtually nothing from November 11 until December 6, 1983. On that date, Bodine's newly-hired attorney made another demand that Kemper cancel the policy on Bodine's life. On December 7, 1983, under the direct orders of Kemper's president, Kemper cancelled the policy. Bodine's attorney was notified of the cancellation; however, Bodine had gone into hiding and did not learn that the policy had been cancelled until February 28, 1984[1]

The only issue that went to trial before the jury was Bodine's *Lopez* claim. The jury found that Kemper was negligent with respect to the request to cancel the insurance policy. The jury found total damages as follows: $75,000 lost earnings; $2,000 out-of-pocket expenses; and $2,000,000 pain and suffering. The jury found that the total damages were proximately caused in the following percentages: 75% by Kemper and 25% by Bodine. Kemper appealed. We affirm in all respects except for the award of damages for pain and suffering, with respect to which we order a remittitur. Although Kemper raises numerous issues on appeal, only three warrant discussion.[2]

I. PRECLUSION OF DAMAGES FOR EMOTIONAL DISTRESS

[1] Kemper argues that damages for pain and suffering or emotional distress were precluded in this case because of a pretrial ruling on January 23, 1989, by Judge Kovachevich granting partial summary judgment in favor of Kemper. Bodine's complaint had alleged not only the *Lopez* claim, but also other claims, including a claim for negligent infliction of emotional distress. In her January 1989 opinion, Judge Kovachevich granted partial summary judgment, dismissing Bodine's claim for negligent infliction of emotional distress, because Bodine had failed to

---

1. Bodine gave Kemper his parents' address and requested that Kemper inform them upon cancellation of the policy; however, Kemper did not send the notification of cancellation to the requested location. Had Kemper done so, Bodine would have received the notification because Bodine contacted his parents twice daily during the relevant time frame.

2. Kemper's other claims of error have no merit and warrant no discussion.

demonstrate a genuine issue of fact either as to physical impact or significant discernible physical injury resulting from psychic trauma.[3] Kemper argues on appeal that Judge Kovachevich's ruling that there was no genuine issue of fact as to significant discernible physical injuries should apply both to Bodine's negligent infliction of emotional distress claim and also to his *Lopez* claim. Following Judge Kovachevich's January 1989 order, the case was assigned for trial to Judge Newcomer. Kemper filed a motion in limine presenting this issue to Judge Newcomer. On March 7, 1989, Judge Newcomer filed an opinion rejecting this argument, finding that Judge Kovachevich's January 1989 order granted summary judgment only on the negligent infliction of emotional distress claim, and thus did not foreclose Bodine's *Lopez* claim or his proof of damages resulting from the *Lopez* violation (i.e., psychic trauma which manifested itself in significant discernible physical injuries). On appeal, Kemper urges us to hold that the district court erred in failing to interpret the January 1989 summary judgment order as foreclosing this claim for damages under *Lopez*.

Although the district court's January 1989 order is not as clear as we might hope, we conclude that the district court did not err in its interpretation. The January 1989 order grants summary judgment on the claim for negligent infliction of emotional distress, but the same order clearly retains the *Lopez* claim. The district court's interpretation of its previous order is not unreasonable. We find further support for this conclusion in the fact that Kemper's motion for summary judgment, on which the court was ruling in its January 1989 order, did not request summary judgment on the issue of whether Bodine could recover damages for emotional distress under his *Lopez* claim. Not having done so, it is understandable that Judge Kovachevich would not grant summary judgment on that issue. Fed.R.Civ.P. 56(c). We also note that the January 1989 partial summary judgment, dismissing some but not all of the claims, was an interlocutory order, and thus was subject to revision by the district court. *United States v. Koenig*, 290 F.2d 166 (5th Cir.1961) (whether to reconsider a previous interlocutory order of a different judge is within the sound discretion of the trial judge), *aff'd sub nom. DiBella v.*

3. The distinction between the physical impact doctrine and the significant discernible physical injury rule is discussed in Part II of this opinion.

United States, 369 U.S. 121, 82 S.Ct. 654, 7 L.Ed.2d 614 (1962);[4] *see also* 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶56.20[1] (2d ed. 1988) (partial summary judgment is interlocutory in character and is subject to revision by the trial court).

Thus, we reject Kemper's argument that Bodine was precluded by the January 1989 order from seeking damages for emotional distress resulting from the alleged *Lopez* violation.[5]

II. IMPACT DOCTRINE VS. SIGNIFICANT DISCERNIBLE PHYSICAL INJURIES RULE

[2] Kemper also argues that Bodine's *Lopez* claim is barred in this case by Florida's physical impact doctrine. As a general rule, Florida law precludes recovery for emotional distress injuries caused by a defendant's negligence in the absence of physical impact to the claimant. *Gilliam v. Stewart,* 291 So.2d 593 (Fla.1974). In this case, Kemper argues that Bodine suffered no physical impact, either from Kemper itself or from the suspected murder plot. Thus, Kemper urges that the district court should have granted its motion for directed verdict and for judgment notwithstanding the verdict. The Supreme Court of Florida has carved out some exceptions to the physical impact doctrine. For example, in *Champion v. Gray,* 478 So.2d 17 (Fla.1985), the Supreme Court addressed the "unusual and nontraditional cause of action in allowing damages caused by psychic injury following an injury to another." *Id.* at 20. There, a drunken driver ran off the road and killed Karen Champion. Karen's mother heard the impact, came immediately to the scene, saw her daughter's body, and was so overcome with shock and grief that she collapsed and died on the spot. *Id.* at 18. The mother's estate sued the driver for damages to, and the wrongful death of, the mother. The Supreme Court rejected the application of the Florida rule requiring that a plaintiff must suffer a physical impact before recovering for emotional distress caused by the negligence of

4. This case was decided prior to the close of business on September 30, 1981, and is binding precedent under *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir.1981).

5. Kemper also suggests on appeal that it was surprised and prejudiced by the district court's ruling allowing Bodine to prove damages for emotional distress. We reject that argument. As noted in the text, the most reasonable reading of the January 1989 order was that it did not preclude such damages, thus, any reliance by Kemper on that order was unreasonable. Moreover, Kemper was on ample notice before trial that Bodine was asserting such damages. Finally, Kemper never sought a continuance on this ground from the district court.

another. Instead, the court held "that a claim exists for damages flowing from a significant discernible physical injury when such injury is caused by psychic trauma resulting from negligent injury imposed on another who, because of his relationship to the injured party and his involvement in the event causing the injury, is foreseeably injured." *Id.* at 20.

[3] The Florida courts have never addressed the issue of which rule applies to a *Lopez* claim, the physical impact rule or the significant discernible physical injuries rule. The district court opined that, when faced with the issue, the Florida Supreme Court would apply the significant discernible physical injuries rule. We agree with the district court's conclusion and adopt the following portion of its reasoning:

The "impact rule" is to provide a "threshold indicator" of significant injury so the courts may feel satisfied that an emotional distress-based injury has actually occurred.

The *Champion* Court determined that this "threshold indicator" is not necessary when a "discernible physical injury [is] caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, [because this] is too great a harm to require direct physical contact . . ." *Id.* at 18. The Court did note, however, that there is still the requirement that the plaintiff suffer a "causally connected clearly discernible physical impairment [which] must accompany or occur within a short time of the psychic injury." *Id.*

The Supreme Court was aware that it had created a new tort in its affirmance of the lower court *Lopez* decision. *Lopez,* 443 So.2d at 949. It is a negligence cause of action unlike all others. The insurance company, in the proper circumstances is held to have a duty to act to deter the death threat:

> Such . . . circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured's death if not by withdrawing the coverage . . . then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured. Knowledge that the insurance company was aware of the plot and would scrutinize the insured's "accidental" death would *surely serve as a deterrent* to the accomplishment of the evil purpose. *Id.* [emphasis added].

Logically, the "impact" which is likely is not caused by the tortfeasor under the new *Lopez* tort. The only impact which is possible is, as in *Lopez,* where the death threat is actually carried out or is in the process of being carried out. The impact is not created by the actions of the defendant insurance company, but rather flows indirectly from the failure to cancel the policy thus leaving reason for the murder, the insurance benefits, as a viable option for the murderers to pursue. The possible impact is one over which defendant has little direct control; it is, rather, an event almost entirely in the hands of a third party, save for defendant's duty to act to deter the event.

I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidenced by the Supreme Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. It is clear from *Lopez* that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated. As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant. Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threshold which the Supreme Court sought to avoid in *Champion,* and would nearly eradicate the recovery under the cause of action it purposefully created.

R4-144 at 5-7.

This conclusion is also supported by several other considerations. The Florida Supreme Court opinion in *Lopez* placed a clear duty on an insurance company with actual notice of the policy beneficiary's murderous intentions toward the insured to investigate and eliminate the motive for the murder, either by cancelling the policy or by warning the beneficiary that no proceeds would be payable if the beneficiary murdered the insured. Although there was physical impact in *Lopez* in the sense that the threatened murder was actually attempted, nothing in the opinion suggests that there was a *sine qua non* of the cause of action. Moreover, it is obvious that in most *Lopez* situations the threatened murder will be intercepted by law enforcement action

so that no physical impact will occur; yet, nothing in the *Lopez* opinion suggests that the cause of action will exist only in those rare situations where the murder is actually attempted such that there is a physical impact on the insured.[6]

Another factor supporting our conclusion is that the strict prerequisites for a *Lopez* claim greatly reduce the risk of fraudulent claims, thus satisfying the *raison d'etre* for the impact rule. A *Lopez* claim arises only where the insurance company receives actual notice of intent on the part of a policy beneficiary to murder the insured. It is unlikely that an insured would manufacture such a claim and give the required notice to the insurance company, because the police investigation which would naturally ensue would almost surely uncover the scheme and subject the insured to severe consequences. Moreover, in the event of an actual murder scheme of the *Lopez* type, the likelihood of fraudulent claims of psychic trauma is mitigated by the fact that emotional distress is very reasonable under such circumstances. In a similar circumstance, the Florida Supreme Court has held that it is sufficient if the psychic trauma manifests itself in significant discernible physical injuries. *Champion v. Gray,* 478 So.2d 17 (Fla.1985).[7]

---

6. The *Lopez* claim is similar to the claim allowed in *Champion v. Gray, supra,* in that both are nontraditional causes of action and both involve a great likelihood that the impact rule would rarely be satisfied.

7. Kemper's reliance on *Sguros v. Biscayne Recreational Dev. Co.,* 528 So.2d 376 (Fla.App. 3 Dist.1987), *rev. denied,* 525 So.2d 880 (Fla.1988), is misplaced. There Mr. and Mrs. Sguros lived aboard a sailboat which was docked at a marina managed by the defendant. In the middle of the night the boat was boarded by intruders who started the engine, while Mr. and Mrs. Sguros were asleep below. Mr. Sguros awakened and attempted to turn off the engine below by cutting the fuel line. However, he was stricken by a heart attack and died. Suit was filed against defendant for wrongful death of Mr. Sguros, alleging negligence in failing to provide adequate security. The court held that the claim was barred because of the absence of any physical impact upon Mr. Sguros. *Sguros* is distinguishable from the instant case in several respects. First, *Sguros* involved an ordinary claim for negligent infliction of emotional distress. Unlike *Sguros,* the instant claim is a narrowly defined, non-traditional cause of action with specific prerequisites which, as discussed in the text above, provide protection against the concerns underlying the physical impact rule. We conclude that the instant case is much more similar to *Champion v. Gray, supra,* which was also a narrowly-defined, non-traditional cause of action, the definition of which provided protection against the concerns underlying the impact doctrine. The *Champion* cause of action is limited to a plaintiff with a close family relationship to the person directly impacted and injured, and is further limited by requiring that the plaintiff be directly involved (i.e., sees the accident or hears it or arrives upon the scene while the injured party is still there). 478 So.2d at 20. Like the requirements of the *Lopez* claim, those limitations protect against fraudulent claims of psychic trauma, because emotional distress is very reasonable under those circumstances.

For the foregoing reasons, we conclude that the district court appropriately held that the Florida Supreme Court would apply the significant discernible physical injuries rule[8] to a *Lopez* claim.

III. REMITTITUR WITH RESPECT TO PAIN AND SUFFERING DAMAGES

[4] Kemper argues that the verdict in the amount of $2,000,000 for pain and suffering was so excessive as to require a remittitur. Kemper argues that the insurance policy was actually cancelled on December 8, 1983, approximately one month after Kemper received notice of the murder plot, and that Bodine was aware that the policy had been cancelled by February 28, 1984.[9] Kemper also argues that much of Bodine's anxiety was necessarily caused by the murder plot itself, rather than by Kemper's alleged negligence in failing to cancel the policy.

We have carefully reviewed the record in this regard. Applying the principles established in *Glazer v. Glazer,* 278 F.Supp. 476 (E.D.La.1968), adopted as the applicable law in *Gorsalitz v. Olin Mathieson Chemical Corp.,* 429 F.2d 1033 (5th Cir. 1970), we conclude that the maximum damages for pain and suffering which the jury could have found on the evidence in this case was $1,000,000. Thus, we order a remittitur of the total damages for pain and suffering in excess of $1,000,000.[10] If, on remand, Bodine declines to accept the remittitur, then there shall be a new trial on the sole issue of total damages for pain and suffering.[11]

---

8. Kemper also asserts that there was not sufficient evidence in this case of significant discernible physical injuries to satisfy the rule. We have carefully reviewed the record, and we conclude that there is sufficient evidence to satisfy the significant discernible physical injuries rule.

9. Although Bodine's attorney apparently received a copy of the cancellation letter shortly after December 8, 1983, Bodine testified that he was in hiding and did not receive notice until February 28, 1984.

10. Of course, this figure will have to be reduced by the 25% comparative negligence which the jury found on the part of Bodine.

11. The issue of the total damages for pain and suffering is sufficiently distinct and separate from the other issues in the case to warrant a new trial on that issue alone. Thus, no new trial is to take place on the other issues, including the findings of liability and comparative negligence, and including the findings of $75,000 lost earnings and $2,000 out-of-pocket expenses.

IV. CONCLUSION

The judgment of the district court is affirmed in all respects except for the award of damages for pain and suffering, and the case is remanded to the district court with instructions to order a remittitur of the damages for pain and suffering so that the total damages for pain and suffering (as thus remitted and before reduction for comparative negligence) shall be $1,000,000. If, on remand, Bodine declines to accept the remittitur, then the district court is instructed to order a new trial on the sole issue of the total damagesd for pain and suffering.

AFFIRMED in part, VACATED in part, and REMANDED with instructions.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDMUND J. BODINE, JR.,

Plaintiff,

vs. **CASE NO. 85-1814-CIV-T-17**

FEDERAL KEMPER LIFE ASSURANCE CO., et al.,

Defendants.

ORDER ON MOTIONS

This cause is before the Court on Defendant Federal Kemper Life Assurance Company's (hereinafter Kemper) motion for summary judgment, Kemper's motion to strike portions of affidavit of Edmund Bodine, Plaintiff's motion for sanctions, and responses thereto.

This circuit clearly holds that summary judgment should only be entered when the moving party has sustained its burden of showing the absence of a genuine issue as to any material fact when all the evidence is viewed in the light most favorable to the nonmoving party. *Sweat v. The Miller Brewing Co.,* 708 F.2d 655 (11th Cir. 1983). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. *Hayden v. First National Bank of Mt. Pleasant,* 595 F.2d 994, 996-7 (5th Cir. 1979), quoting *Gross v. Southern Railroad Co.,* 414 F.2d 292 (5th Cir. 1969). Factual disputes preclude summary judgment.

The Supreme Court of the United States held, in *Celotex Corp. v. Catrett,* 477 U.S. 317, 91 L.Ed.2d 265, 106 S.Ct. 2548, (1986),

> In our view the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to establish the existence of an element essential to that party's case, and

> on which that party will bear the burden of proof at trial. Id. at 273.

The Court also said, "Rule 56(e) therefore requires that nonmoving party to go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing there is a genuine issue for trial.' " *Celotex Corp.*, at p. 274.

On August 20, 1986, Plaintiff filed an third amended complaint (hereinafter complaint). Count II of the complaint was directed at Defendant Kemper and states the following (paragraph numbers are cited as they appear in the complaint):

> 12. On or about July 18, 1982, a policy of insurance in the amount of Two Million Dollars ($2,000,000.00) was issued by Defendant, KEMKER, upon the life of EDMUND J. BODINE, JR., Policy Number FK1309281.
>
> 13. Defendant, KEMKER, was negligent and careless in their conduct regarding Policy Number FK1309281 in one or more of the following ways:
>
> > A. In issuing a policy of life insurance with such a large face value without adequately and properly investigating the insured and the beneficiary thereto, nor the circumstances surrounding such application for insurance, thereby exposing the insured to foreseeable danger from the beneficiary to the said policy.
> >
> > B. In issuing a policy of life insurance wherein the only beneficiary was an entity which had no relationship nor insurable interest therein (i.e. Cayman Films, Ltd.) without adequately and properly investigating the circumstances behind such application for insurance.
> >
> > C. In failing to discover the existence of such conditions following the issuance of the insurance contract in a reasonable and timely fashion after negligently and carelessly permitting such conditions to exist.

D. In failing to cancel the aforementioned policy of insurance after they had received actual verbal and written notification of the beneficiary's murderous intent in derogation of the well-being of the insured.

E. In failing to properly and adequately investigate the facts concerning the welfare and well-being of the insured following their receipt of actual notice of the circumstances aforementioned; and

F. In failing to discover the aforementioned facts in a reasonable and timely fashion after issuing the said policy of insurance.

14. Despite receiving direct communication and actual and express notice of the murderous intent to the life of the insured under Policy Number FK1309281 by the policy beneficiary, Defendant, KEMPER, willfully, wantonly, maliciously, callously and with complete disregard for the rights and well-being of their insured, and despite an express duty to this policy insured, did refuse to withdraw and cancel said policy of insurance, thereby deliberately exposing EDMUND J. BODINE, JR., to continued violence and threats of death as aforesaid.

15. As a direct and proximate cause of the willfully malicious conduct of Defendant, KEMPER, EDMUND J. BODINE, JR., has suffered severe trauma, physical and emotional. He has been prevented from the completion of several business ventures and has incurred losses therein. Plaintiff has been further exposed to false and libelous accusations, has been prevented from leading a normal lifestyle and has been forced to secret himself and isolate himself from friends, relations, business associates and others with whom he might ordinarily associate with upon a daily basis.

WHEREFORE, the Plaintiff, EDMUND J. BODINE, JR., demands judgment for compensatory damages and punitive damages in the amount of ONE HUNDRED MILLION DOLLARS ($100,000,000.00) against Defendant, KEMKER, and further demands trial by

jury of all issues triable as of right by jury.

The first question the Court must address is what, if any, duty Defendant Kemper owed to Plaintiff in this instance to protect Plaintiff or to investigate prior to issuing the policy in question. The Court has found several limited instances where the law places a duty on an insurance company to protect its insured. "The only duty the law imposes on an insurance company to protect its insured is that the company take reasonable steps to determine whether the insured has consented to the policy or the change in beneficiary or should have known that the person procuring the policy did not have an insurable interest in the insured's life." *Bacon v. Federal Kemper Life Assurance Co.,* 512 N.E.2d 941 (Mass. 1987).

There are several instances where an insurance company has been found liable for harm to an insured, the facts of those cases limit the liability to a handful of circumstances. In *Life Insurance Company of Georgia v. Lopez,* 443 So.2d 947 (Fla. 1983), the insured claim he had not consented to the issuance of the policy (he claimed he had been tricked by his wife, that he called the insurance company and told them of the danger to his life and that they failed to investigate. The court answered, in the affirmative, the following certified question:

> Whether an insured issuing an insurance policy can be liable in tort to the insured where the policy beneficiary attempts to murder the insured in order to collect the policy benmefits and where the insurer had actual notice of the policy beneficiary's murderous intent. *Id.,* at 948.

The Court stated that insurance companies generally cannot be held to be "guarantors" of the good intentions of their customers, but, neither, can they be relieved of a duty to investigate when a beneficiary's criminal motive is made known to them. *Id.,* at 949.

A second relevant case is *Liberty National Life Insurance Co. v. Weldon,* 100 So.2d 696 (Ala. 1957). In *Weldon,* the father of the insured sued for wrongful death of the insured resulting from the alleged negligence of the insurers in issuing policies on the child's life to an aunt with no insurable interest, where the insurance agents were aware of the lack of insurable interest, and where the aunt subsequently murdered the child. The court found, in these circumstances, the question of negligence to be a jury issue.

In *Ramey v. Carolina Life Insurance Co.,* 135 S.E.2d 362 (S.C. 1964), the plaintiff alleged that the signatures on the application and inspection for life insurance forms were forgeries and were known by the defendant to be forgeries, but that the defendant issued the policy despite the knowledge that the plaintiff did not consent to the policy. The court, adopting the order of the circuit judge, found a clear distinction between cases where the "policy is procured by the insured bona fide on his own motion and cases in which it is procured by another. It is a very different thing for a man to create voluntarily an interest in his termination and to allow some one else to do so at their will." *Id.,* at 364-65.

The three situations which courts have held create a cause of action against the insurer for the issuance of a policy of life insurance, which results in danger to the life of the insured, may be summarized as follows:

1. Where the insurer has actual knowledge of threats on the life of the insured, the insurer fails to investigate the allegations of danger to the insured, and fails to rescind the policy, a *Lopez* situation;

2. Where there is no insurable interest in the named insured by the beneficiary and the insurer knew, or should have known, of the lack of insurable interest, a *Weldon* situation; and

3. Where the insurer knew, or should have known, of the forgery of the insured's signature on the policy application.

The Court first addresses the allegations of the complaint pertaining to the issuance of the life insurance policy on Plaintiff in or about July 18, 1982. (Paragraph 13, subparagraphs A, B, C, and F of Count II of the third amended complaint. The Court, upon due consideration, finds that the facts as alleged herein do not meet the criteria for finding liability against Defendant for the issuance of the life insurance policy.

In this case, Plaintiff meet with Kemper agent Robert Hiatt in Salt Lake City, Utah for the purposes of obtaining key man insurance for himself and three others. Plaintiff signed the application for insurance and subsequently submitted himself for the required physical examination in pursuit of the policy. There are no allegations in this case of forgery, that the insurer had any

reason to be aware that the beneficiary of the policy might not have an insurable interest, or that at the time of the issuance of the policy the insurer knew or should have known of any threats to the life of Plaintiff or any other insured.

The Court finds that there is no issue of material fact as to whether Defendant Kemper breached any duty to Plaintiff as to the issuance of the insurance policy. The Court finds that the motion for summary judgment should be **granted** as to Paragraph 13, sub-paragraphs A, B, C, and, F of Count II of the third amended complaint.

It is not entirely clear from the memorandum in support of the motion for summary judgment whether or not Defendant Kemper seek summary judgment as to Paragraph 13, sub-paragraphs D and E of Count II, relating to the alleged negligent failure to cancel the policy following notification of the death threats. Assuming Defendant seeks summary judgment of all issues, the Court has reviewed that issue as to whether or not summary judgment is appropriate.

At some point in time, approximately November of 1983, Defendant Kemper was notified by Plaintiff and another insured, Phillip Yordan, that there were death threats against their lives. The two men requested that the life insurance policies be cancelled. Defendant Kemper alleges that they reasonably undertook to investigate the allegations presented to them regarding death threats and when they had sufficient evidence of the existence of the threats they cancelled the policies, without having the permission of the owner of the policy. As stated previously, when an insurer has notice of threats against an insured's life it has a duty to investigate and to cancel the policy if appropriate. *Lopez*, 448 So.2d 947.

The Court finds that the issue regarding the claim of negligence in not cancelling the policy after notification of the death threats does present a genuine issue of material fact. The question for the jury will be whether or not the investigation, the time it took to conduct and the handling of it, satisfied Defendant's duty pursuant to case law. The Court cannot find as a matter of law, based on the record presented herein, that the duty was met and that there is no genuine issue of negligence. The motion for summary judgment as to this issue should be **denied.**

Paragraph 13, subparagraphs D and E, and Paragraph 14, Count II of the third amended complaint, asserts that the failure of Defendant Kemper to immediately cancel the life policies was willful, wanton, malicious, etc., thus entitling it to punitive damages.

The parties agree that the standard for awarding punitive damages is "an intentional wrong that amount[s] to an independent tort, . . . the entire want of care or attention to duty that would allow a jury to impute malice . . ." *Nicklaus v. Miami Burglar Alarm Co., Inc.,* 339 So.2d 175, 177-78 (Fla. 1976; *American International Land Corp. v. Hanna,* 323 So.2d 567 (Fla. 1975).

The Court, having reviewed the record and upon due consideration, finds that Plaintiff has failed to establish a genuine issue of fact as to the issue of entitlement to punitive damages. There is nothing in the record to support the punitive damage claim. The record shows that Defendant Kemper undertook to investigate the allegations of death threats upon receipt of notice from Plaintiff. The Court adopts Defendant Kemper's recitation of these facts which appear at pages 18 through 21 of its memorandum in support of the motion for summary judgment.

Plaintiff has failed to come forward with any evidence in support of the opposition to the motion for summary judgment which support any finding of willful, malicious, wanton disregard of their duty against Defendant Kemper. The motion for summary judgment as to the claim for punitive damages should be **granted.**

The State of Florida recognizes the tort of intentional infliction of emotional distress. The threshold test in assessing a claim for this tort is whether

> . . . such behavior is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." In applying the standard, it is manifest that the subjective response of the person who is the target of the actor's conduct is not to control the question of whether the tort occurred. Rather, an evaluation of the claimed misconduct must be undertaken to determine, as objectively as is possible, whether it is "atrocious, and utterly intolerable in a civilized community." (cite omitted) That burden falls to the judiciary—it is a matter of law, not a question

> of fact. (cite omitted) The deportment described in the pleaded facts with which we are concerned, condemnable by civilized social standards, does not ascend, or perhaps descend, to a level permitting us to say that the benchmarks enunciated in *Metropolitan* have been met.

Ponton v. Scarfone, 468 So.2d 1009, 1011 (Fla. 2d D.C.A. 1985); *Metropolitan Life Ins. Co. v. McCarson,* 467 So.2d 277 (Fla. 1985).

The Court has assessed the allegations made against Defendant Kemper to determine as a matter of law whether the allegations, as supplemented by the affidavits and depositions, support Plaintiff's claim of intentional infliction of emotional distress. Upon due consideration, the Court is satisfied that the allegations and supplemental evidence cannot sustain the claim. The alletations fall far short of behavior which is "beyond all possible bounds of decency." The motion for summary judgment should be **granted** as to the claims for intentional infliction of emotional distress.

The final issue of the motion for summary judgment is whether the is a genuine issue of material fact as to any claim for negligent infliction of emotional damages. Florida recognizes this cause of action where a person suffers a significant discernible physical injury resulting from psychic trauma caused by negligence. *In re Eastern Airlines, Inc., Engine Failure,* 629 F.Supp. 307 (S.D. Fla. 1986); *Champion v Gray,* 478 So.2d 17 (Fla. 1985).

Plaintiff has the burden of establishing the existence of physical injury in order to be entitled to damages for negligent infliction of emotional damages, and, therefore, must by affidavits, depositions, etc. establish a genuine issue of material fact exists of that claim. *Celotex Corp.,* 477 U.S. at 274. All we have in this cause is Plaintiff's statement that he has suffered "physical trauma" (Paragraph 15, third amended complaint) and "physical distress" (answer to interrogatories attached to Defendant's memorandum in support of motion for summary judgment). Plaintiff has failed to go beyond the conclusory allegations of the complaint to establish there exists a genuine issue of material fact on this claim. Accordingly, it is

ORDERED that the motion for summary judgment be **granted** and the following claims of the third amended complaint be **dismissed:** Paragraph 13, subparagraphs A, B, C, and F, of

Count II, the claim for punitive damages, the claim for intentional infliction of emotional distress, and the claim for negligent infliction of emotional distress. There remains pending in this cause the issue of negligent failure to cancel the insurance policy, following notification of the existence of death threats, for approximately one month.

DONE and ORDERED in Chambers, in Tampa, Florida this 23rd day of January, 1989.

/s/ Elizabeth A. Kovachevich

ELIZABETH A. KOVACHEVICH
United States District Judge

Copies to:
All parties and counsel of record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

EDMUND J. BODINE, JR.,

Plaintiff,

v. **CASE NO: 85-1814-Civ-T-17**

FEDERAL KEMPER LIFE ASSURANCE COMPANY, et al.

Defendants,

MEMORANDUM

This is a state cause of action in diversity pursuant to the recently recognized tort of negligent failure of an insurance company to cancel a life insurance policy following notice of a plot to kill the insured. Before me now is defendant's Motion in Limine to Exclude Evidence of Plaintiff's Damages. For the rational which follows I will deny defendant's motion.

Background.

The facts for the purpose of the motion before me now are relatively simple. Plaintiff, Edmund Bodine, was a partner in a motion picture production venture. In July, 1982, Key Men Life Insurance policies were obtained in the amount of approximately $2,000,000.00 for each partner in the venture.

United States government agents informed Bodine in October, 1983, that a person or persons had been hired to kill him. Bodine, after some investigation of his own, determined that the plot to kill him was an effort by one of his business partners to collect on the Key Man Insurance policy benefits. Bodine naturally enough called defendant, Federal Kemper Life Assurance Company, to demand that the policy be immediately cancelled.

Plaintiff alleges that for reasons due to the negligence of defendant, the policy was not cancelled until approximately 30 days later. Plaintiff asserts damage for physical, financial, and

psychological injuries suffered as a result of the emotional distress he experienced during this 30 day waiting period. It is the issue of plaintiff's legal right to collect these damages which is the focus of defendant's motion.

Discussion.

As a federal court sitting in diversity I must apply the law of the forum state. *Erie Railroad Company v. Tompkins,* 304 U.S. 64 (1938). However, when the state courts have not spoken as to a particular issue, the federal court must predict how the state's Supreme court would rule when faced with that issue. *Commissioner v. Estate of Bosch,* 387 U.S. 456, 457 (1967); *Delduca v. United States Fidelity & Guaranty Company,* 357 F.2d 204 (5th Cir. 1966). While a federal court is not free to follow its own inclinations in such matters, I must be sensitive to the doctrinal trends of the state of Florida whose law I am to apply in this case. *See Morton v. Abbatt Laboratories,* 538 F.Supp. 593 (M.D. Fla. 1982) (If no state precedent, federal court sitting in diversity should look for indicators as to how state Supreme Court would rule); *See also Becker vs. Interstate Properties,* 569 F.2d 1203, 1206 (3d Cir. 1977), cert. den. Interstate Properties v. Becker, 431 U.S. 906 (1978).

Previously, this Court granted summary judgment in favor of defendant on all counts alleged except for the cause for "negligent failure to cancel the insurance policy, following notification of the evidence of death threats. . ." *Bodine v. Federal Kemper Life Assurance Company,* No. 85-1814-CIV-T-17, slip. op. at 11 (M.D. Fla., Jan. 23, 1989)[1]. Defendant's motion before me now asks this Court to effectively deny Plaintiff the right to recover damages on this claim.

The tort of the negligent failure of an insurance company to cancel a life insurance policy when it is aware of a death threat against the insured has only recently been recognized by Florida Courts. *See Lopez v. Life Insurance Company of America,* 406 So.2d 1155 (Fla. 4th DCA, 1981), *affirmed* 433 So.2d 947 (Fla. 1983).

---

1. Summary Judgment was entered prior to the time this case was reassigned to my docket for trial. In addressing this Motion in Limine I need not apply the summary judgment standards. For the purposes of this motion I am limited solely to the technical issue of damages pursuant to this cause of action.

The Court in *Lopez* sidestepped the question of any limitation on damages resulting from a purely psychological injury as a result of the new tort. The Court stated,

> [A]ppellee relies on *Claycomb v. Eichles*...for the proposition that damages may not be recovered for mental anguish or physical injury resulting from emotional stress which is caused by negligence where there is no physical impact. We neither subscribe to nor repudiate that proposition here.

Lopez, 406 So.2d at 1160. The Court went on to state the issue was moot because there was physical impact in *Lopez.* Defendant, in the instant case, argues that the lack of physical impact precludes evidence of substantially all of plaintiff's claimed damages. I disagree.

Defendant's argument is founded in the general rule applied by Florida Courts regarding emotional stress in negligence case. The Court in *Claycomb v. Eichles,* 399 So.2d 1050 (Fla. 2dDCA, 1981), stated this rule:

> The rule in Florida is that damages may not be recovered for mental anguish or physical injury resulting from emotional stress caused by the negligence of another, in the absence of a physical impact upon the plaintiff.

Id. at 1051.

The Florida Supreme Court has expressed the rule similarly. The "circumstances under which one may recover for emotional or mental injuries, is when there has been a physical impact or when they are produced as a result" of an intentional tort to cause emotional distress. *Gilliam v. Stewart,* 291 So.2d 593, 595 (Fla. 1974). *See also Steiner and Munach, P.A. vs. Williams,* 334 So.2d 39 (3d DCA, Fla. 1976), *cert. den.* 345 So.2d 429 (Fla. 1977).

In 1985, the Florida Supreme Court modified the "impact rule" for cases of negligent infliction of emotional harm where the plaintiff witnesses an injury to another and suffers some emotional harm. The Supreme Court held:

> that a claim exists for damages flowing from a significant discernable physical injury when such injury

> is caused by psychic trauma resulting from negligent injury imposed to another who, because of his relationship to the injured party and his involvement in the event causing the injury is foreseeably injured.

Champion v. Gray, 478 So.2d 17, 20 (Fla. 1985). *See also Ledford v. Delta Airlines, Inc.,* 658 F. Supp. 540 (S.D. Fla. 1987).

Although this modified "impact rule" does not apply to the cause of action before me now, it does indicate that the Florida Supreme Court has found equitable reason to depart from the rule under certain circumstances. Therefore, in order to predict how the Florida Supreme Court would apply the "impact rule" for the tort of the negligent failure to cancel a life insurance policy, I must examine the policies expressed by the Florida courts as to the "impact rule."

The Florida Supreme Court in *Champion* stated the policy behind the impact rule:

> The impact doctrine gives practical recognition to the thought that not every injury which one person may, by his negligence, inflict upon another should be compensated in money damages. There must be some level of harm which one should absorb without recompense as the price he pays for living in an organized society.

Champion, 478 So.2d at 18, *citing Gilliam, supra,* 271 So.2d at 477. In other words, the "impact rule" is to provide a "threshold indicator" of significant injury so the courts may feel satisfied that an emotional distress-based injury has actually occurred.

The *Champion* Court determined that this "threshold indicator" is not necessary when a "discernable physical injury (is) caused by psychological trauma resulting from a negligent injury imposed upon a close family member within the sensory perception of the physically injured person, is too great a harm to require direct physical contact. . ." *Id.* at 18. The Court did note, however, that there is still the requirement that the plaintiff suffer a "causally connected clearly discernable physical impairment (which) must accompany or occur within a short time of the psychic injury." *Id.*

The Supreme Court was aware that it had created a new tort

in its affirmance of the lower court *Lopez* decision. *Lopez,* 443 So.2d at 949. It is a negligence case of action unlike all others. The insurance company, in the proper circumstances is held to have a duty to act to deter the death threat:

> Such...circumstances must surely impose on the insurance company a duty to eliminate any motive for effecting the insured's death if not by withdrawing the coverage...then at least by warning the beneficiary that no proceeds would be payable if she in fact murdered the insured. Knowledge that the insurance company was aware of the plot and would scrutinize the insured's "accidental" death would *surely serve as a deterrent* to the accomplishment of the evil purpose.

Id. [emphasis added].

Logically, the "impact" which is likely is not caused by the tortfeasor under the new *Lopez* tort. The only impact which is possible is, as in *Lopez,* where the death threat is actually carried out or is in the process of being carried out. The impact is not created by the actions of the defendant insurance company, but rather flows indirectly from the failure to cancel the policy thus leaving reason for the murder, the insurance benefits, as a viable option for the murderers to pursue. The possible impact is one over which defendant has little direct control; it is, rather, an event almost entirely in the hands of a third party, save for defendant's duty to act to deter the event.

I conclude that the Florida Supreme Court would not find that the "impact rule" would create any principled "threshold" of injury that would separate meritorious claims from those which are not meritorious. The doctrinal trend in Florida, as evidence by the Supreme Court's decision in *Champion,* is to a relaxation of the "impact rule" in situations where the rule creates an arbitrary bar to those who should be compensated for emotional distress-related injury. It is clear from *Lopez* that the Florida Supreme Court believes that those injured by the negligence of the insurance companies in cases such as this one should be compensated. As in the scenario in *Champion,* the Court believes that the harm is "too great to require direct physical contact." There may be no emotional distress greater than the fear that one's life is constantly in danger from an unknown assailant. Therefore I conclude that the application of the "impact rule" would create the type of unprincipled threhold which the Supreme Court sought

to avoid in *Champion*, and w[illegible]early eradicate the recovery under the cause of action it purpo[illegible]fully created.

I would emphasize that plaintiff still has the burden at trial to prove that his injuries were causally connected to defendant's action and that a clearly discernable physical injury or manifestation occurred within a short time of the psychological injury. *See Champion*, at 19. Physical impact is different from a physical manifestation of the distress-induced injury. The *Champion* court clearly indicated that a claim for emotional distress must be accompanied by a physical manifestation of the emotional injry absent impact. *Id. See also Eagle-Pitcher Industries, Inc. v. Cox*, 481 So.2d 517 (3d DCA), *review denied* 492 So.2d 1331 (Fla. 1985). The physical manifestation requirement is a much more principled manner in which to discern the severity of the mental distress of a plaintiff.

The Court is not unaware that plaintiff may have an uphill battle in proving that certain items of his damages were proximately caused by defendant's actions. There may also be a legitimate issue as to the foreseeability of some of plaintiff's alleged injuries. However, at this stage of the case, given the legal implications of this decision, these issues are more properly questions of fact for the jury or the subject of mid-trial motion for directed verdict.

I will deny the defendant's Motion in Limine in an appropriate Order which follows.

/s/ Clarence C. Newcomer, Jr.

Clarence C. Newcomer, J.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 89-3481

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING
(November 15, 1990)

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Federal Kemper Life Assurance Company, is Denied.

ENTERED FOR THE COURT:

/s/ R. Lanier Anderson
United States Circuit Judge

APPENDIX E

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

AMENDED JUDGMENT IN A CIVIL CASE

EDMUND J. BODINE, JR.

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY

CASE NUMBER: 85-1814-CIV-T-17

[X] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[ ] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED That Judgment is Entered for the Plaintiff, Edmund J. Bodine, Jr., in the Amount of One Million Five Hundred Fifty-seven Thousand, Seven Hundred Fifty Dollars ($1,557,750.00), and Against the Defendant, Federal Kemper Life Assurance Company, as Adjusted by the Court, on the Record, on March 9, 1989.

March 16, 1989
Date

DONALD M. CINNAMOND
Clerk

/s/ Darleen Q. Dailey
(By) Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA TAMPA DIVISION

EDMUND J. BODINE, JR. **CIVIL ACTION**

v.

FEDERAL KEMPER LIFE ASSURANCE COMPANY, et al.

NO. 85-1814-CIV-T-17

O R D E R

AND NOW, this 30th day of May, 1989, upon consideration of defendant's Motion for New Trial, Motion for Remittituer, and Motion for Judgment Notwithstanding the Verdict, and the response thereto, it is hereby Ordered that defendant's motions are DENIED.

AND IT IS SO ORDERED.

/s/ Clarence C. Newcomer

Clarence C. Newcomer, J.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3481

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 15 1990
MIGUEL J. CORTEZ
CLERK

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

BY THE COURT:

Appellant's Request for Certification of Dispositive Issues of Law to the Supreme Court of Florida, is DENIED.

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3481

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
NOV 15 1990
MIGUEL J. CORTEZ
CLERK

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

(xxx) The motion of Appellee, for (XX) stay ( ) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of Appellee, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition

has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ R. LANIER ANDERSON
UNITED STATES CIRCUIT JUDGE

APPENDIX I

§ 25.031, *Fla. Stat.* (1989)

Supreme Court authorized to receive and answer certificates as to state law from federal appellate courts. The Supreme Court of this state may, by rule of court, provide that, when it shall appear to the Supreme Court of the United States, to any circuit court of appeals of the United States, or to the Court of Appeals of the District of Columbia, that there are involved in any proceeding before it questions or propositions of the laws of this state, which are determinative of the said cause, and there are no clear controlling precedents in the decisions of the Supreme Court of this state, such federal appellate court may certify such questions of propositions of the laws of this state to the Supreme Court of this state for instructions concerning such questions or propositions of state law, which certificate the Supreme Court of this state, by written opinion, may answer.

* * *

RULE 9.150 DISCRETIONARY PROCEEDINGS TO REVIEW CERTIFIED QUESTIONS FROM FEDERAL COURTS

(a) Applicability. Upon either its own motion or that of a party, the Supreme Court of the United States or the United States Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

(b) Certificate. The certificate shall contain the style of the case, a statement of the facts showing the nature of the cause and the circumstances out of which the questions of law arise, and the questions of law to be answered. The certificate shall be prepared as directed by the federal court. It shall be certified to the Supreme Court of Florida by the clerk of the federal court.

(c) Record. The Supreme Court of Florida, in its discretion, may require copies of all or any portion of the record before the federal court to be filed where the record may be necessary to the determination of the cause.

(d) Briefs. The brief of the party designated by the federal court as the moving party shall be served within 20 days of the filing of the certificate. Additional briefs shall be served as prescribed by Rule 9.210.

(e) Costs. The costs of these proceedings shall be equally divided between the parties unless otherwise ordered by the court.

* * *

28 U.S.C. § 1652.

State laws as rules of decision

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

* * *

11th Cir.R. 35-3

Extraordinary Nature of Suggestions of In Banc Consideration

A suggestion of in banc consideration, whether upon initial hearing or rehearing, is an extraordinary procedure intended to bring to the attention of the entire court a precedent-setting error of exceptional importance in an appeal or other proceeding, and, with specific reference to a suggestion of in banc consideration upon rehearing, is intended to bring to the attention of the entire court a panel opinion that is allegedly in directly conflict with precedent of the Supreme Court or of this circuit. Alleged errors in a panel's determination of state law, or in the facts of the case (including sufficiency of the evidence), or error asserted in the panel's misapplication of correct precedent to the facts of the case, are matters for rehearing before the panel but not for in banc consideration.

Counsel are reminded that the duty of counsel is fully discharged without filing a suggestion of rehearing in banc if the case does not meet the rigid standards of FRAP 35(a), and that

the filing of a petition for rehearing or suggestion of rehearing in banc is not a prerequisite to filing a petition for writ of certiorari.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-3481

D.C. Docket No. 85-1814 Civ-T-17

EDMUND J. BODINE, JR.,

Plaintiff-Appellee,

versus

FEDERAL KEMPER LIFE ASSURANCE COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: HATCHETT and ANDERSON, Circuit Judges, and DYER, Senior Circuit Judge.

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby AFFIRMED in part, VACATED in part; and that this cause be and the same is hereby REMANDED to said District Court with instructions in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear their own costs on appeal.

Entered: September 26, 1990
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabe
Deputy Clerk

ISSUED AS MANDATE: DEC 04 1990